No. 91-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FERRIS J. ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., MAGAZINE PUBLISHERS OF AMERICA, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AND RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the Magazine Publishers of America, Inc., the National Association of College Stores, Inc., the Periodical and Book Association of America, Inc., and the Recording Industry Association of America, Inc. (collectively, the "*amici*") submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioner and respondent, which are submitted herewith.

THE AMICI

The *amici*'s members publish, produce, distribute and sell books, magazines, films, videotapes, recordings and other printed, recorded and filmed materials of all types, including those which are scholarly, literary, scientific and entertaining. As mainstream distributors and booksellers who distribute and sell popular, literary, scientific and scholarly books, periodicals and recordings, *amici*'s members have a significant interest in the resolution of the issue before the Court. *Amici*'s members do not own what are commonly referred to as "adult" retail stores; nor do they distribute the "adult" materials which are generally found in such stores. *Amici*'s members do, however, distribute and sell mainstream materials which, while not obscene, contain sexually explicit matter or other matter that certain persons may find objectionable.

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading material.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the vast majority of national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Magazine Publishers of America ("MPA") is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,850 college stores located throughout the United States.

The Recording Industry Association of America, Inc. ("RIAA") is a not-for-profit corporation, whose member companies create and produce sound recordings and manufacture and distribute phonorecords. The members of the RIAA produce at least ninety-five percent of the authorized phonorecords manufactured and sold in the United States, including longplaying records, cassette tapes, and compact discs. The RIAA and its members have a continuing commitment to preserving the freedom of artists and producers to create and distribute recorded musical works of interest to all segments of the public.

INTEREST OF THE AMICI AND SUMMARY OF ARGUMENT

The interest of *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case, and in particular the spectre of forfeiture of their entire businesses, would impact upon those who produce, distribute, show and sell books, periodicals, videos and recordings that are not obscene.

Although the case *sub judice* involves "adult" establishments, forfeiture under the Racketeer Influenced Corrupt Organizations Act ("RICO"), as upheld by the Eighth Circuit, is by no means limited to businesses that deal primarily or exclusively in sexually explicit materials. *See Alexander v. Thornburgh*, 943 F.2d 825, 829 (8th Cir. 1991). In fact, the Eighth Circuit authorized seizure of thirteen entire stores, including massive seizure and destruction of printed materials and videotapes, without any attempt to distinguish between obscene and First Amendment protected materials. Everything was seized and destroyed. The threat of "extermination" of one's business obviously chills the exercise of First Amendment rights even by *amici*, who are mainstream retailers, distributors and publishers, not dealers in obscenity. The general public's First Amendment rights are also impaired when First Amendment enterprises they frequent may be closed, and the First Amendment protected materials they seek are unavailable or, even worse, destroyed.

The concern of legitimate businesses that RICO or the mere threat of its application will be used as a pretext to curtail or censor protected speech is not unwarranted. There has been rising agitation directed against booksellers, other retailers, publishers and distributors selling First Amendment protected

materials. The recordings of 2 Live Crew and Ice T, various Madonna videos, Robert Mapplethorpe books and photographs, Bret Easton Ellis' *American Psycho* and Salman Rushdie's *Satanic Verses*, all of which are carried by mainstream firms such as *amici*, have recently been boycotted and subjected to governmental or public attack.

These are but a few troubling recent examples, and there are more. The U.S. Department of Justice initiated multiple obscenity prosecutions to harass a national distributor and force him "out of the business" so that he could no longer distribute concededly First Amendment protected sexually frank materials. *U.S. v. P.H.E., Inc.*, 965 F.2d 848, 858 (10th Cir. 1992). In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but that were adjudged to be protected by the First Amendment. *See Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552, 565 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987).

The Attorney General's Commission on Pornography ("Commission") in its July 1986 report not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney General's Commission on Pornography, *Final Report*, 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially

eliminate obscenity businesses." *Id.* at 435, 498.[1] Although the Commission did not say so, RICO also provides an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in a community and to back up this coercion with the threat of forfeiture of any legitimate business that inadvertently crosses the gray line between what is obscene and what is not.

The spectre of the seizure of one's business — whether it be an individual's bookstore constituting all of one's individual assets, or the national assets of a large publishing house or chain of retail stores — as the result of as few as two inadvertent steps over the very gray line between what might be found obscene in some communities and what might not be, is so overwhelming and draconian that it understandably frightens the members of each *amici* before this Court.

Nor is this fear of seizure unwarranted. The case now before this Court was based on obscenity determinations for only seven items. *Alexander*, 943 F.2d at 829. Despite the small

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[1] In addition to the federal RICO forfeiture provisions directly at issue here, at least fourteen states have their own RICO or similar forfeiture provisions, based on obscenity predicate acts. *See e.g.* Ariz. Rev. Stat. Ann. § 13-2301 *et seq.* (West Supp. 1991); Colo. Rev. Stat. Ann. §§ 18-17-103(5)(b)(VI),-105(1)(b),-106(2) (West Supp. 1991); Conn. Gen. Stat. §§ 53-394, 53-397 (Supp. 1991); Del. Code §§ 1502(9)(a)(7), 1504(b), 1505(b) (Supp. 1991); Fla. Stat. Ann. §§ 895.02(1)(a)(29), 895.05(2)(a) (West Supp. 1991); Ga. Code Ann. §§ 16-14-3(9)(A)(xii), 16-14-6(a)(5), 16-14-7(a) (Supp. 1991); Idaho Stat. Ann. §§ 18-7803(a)(8), 18-1704(f) (Supp. 1991); Ind. Code Ann. §§ 34-45-6-1(2)(4), 34-4-30.5-3 (West Supp. 1991); Nev. Rev. Stat. §§ 207.420, 207.460 (Michie 1991); N.J. Stat. Ann. §§ 2C:41-1(e), 2C:41-3, 2C:41-4(a)(9) (West Supp. 1991); N.C. Gen. Stat. §§ 75-D-3(c)(2), 75-8 (Supp. 1991); Okl. St. Ann. §§ 1402(10)(v), 1405(A) (1991); Wash. Stat. Ann. §§ 9A.82.010(14)(s), 9A.82.100(4)(f) (1991); Wis. Stat. Ann. §§ 946.82(4), 946.86(1), 946.87(2)(a) (1991).

number of obscenity violations, thirteen book and video stores were seized, *id.*, and over three tons of inventory were burned or crushed. *Minneapolis Star Tribune*, October 19, 1991 at 1B. Unlike this case, which proceeded to judgment, defendants in other cases may settle before trial and surrender their First Amendment rights, coerced by the possibility of a RICO forfeiture penalty.

A long line of cases of this Court protects the members of *amici* from such fear, coercion and surrender of their First Amendment rights. The prior restraint doctrine, as applied from *Near v. Minnesota*, 283 U.S. 697 (1931), through *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), to date, prevents the forfeiture of speech businesses and presumptively protected materials except for material found obscene located in the jurisdiction in which they were found obscene, and the direct proceeds thereof. The forfeiture provisions of RICO produce precisely the evil *Near* and its progeny prohibit —government cannot suppress future, presumptively protected speech based on a finding of or "nexus" to present or past undesirable speech. *See Vance*, 445 U.S. at 311 n.3. *Compare Alexander*, 943 F.2d at 833.

The talismanic lexicon or characterization of RICO does not overcome the protections of the First Amendment and the prior restraint doctrine. Neither labeling the forfeiture a criminal penalty nor denominating a bookstore, publisher or other speech business a "criminal enterprise" changes the impact and application of this significant, longstanding rule of constitutional law against prior restraints. Unless the Court reaffirms the existing doctrine relating to prior restraints, and applies it to forfeiture, the fears of *amici*'s members will be justified.

Further, RICO forfeiture, in its broadest sweep, has an unconstitutional chilling effect on each member of *amici*. Constitutionally protected expression is "often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc.*

v. Sullivan, 372 U.S. 58, 66 (1963). "RICO penalties for obscenity . . . intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as *Ulysses*." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 252 (1990) (Scalia, J.) (concurring and dissenting).

RICO's forfeiture provisions can survive only to the extent they comport with the First Amendment. The current breadth of RICO's forfeiture provision cannot pass constitutional muster when applied to a speech business. As the Ninth Circuit has recently concluded, tailoring the scope of forfeiture to prevent forfeiture or non-destruction of presumptively protected expressive material "acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures." *Adult Video Ass'n v. Barr*, 1992 U.S. App. LEXIS 13786, No. 90-55252, slip op. at 6838 (9th Cir. June 18, 1992) (narrowing RICO's forfeiture provisions).

ARGUMENT

I. FORFEITURE OF AN ENTIRE SPEECH BUSINESS, INCLUDING PROTECTED MATERIALS AND THE MEANS TO ENGAGE IN SPEECH, IS AN UNCONSTITUTIONAL PRIOR RESTRAINT

The federal RICO statute provides after conviction for forfeiture by defendant of any "enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of, [RICO]; and . . . any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a). Forfeiture is mandatory upon conviction. *Id.*

It is the clearly expressed intent[2] and obvious effect of the RICO forfeiture provision, after two specific findings of prohibited unprotected expression, to cause forfeiture of the entire business enterprise, wherever located, in which the violations were committed with the destruction of all the constitutionally protected material therein and the seizure of the means of speech.

Amici's members range in size from small local retailers to large regional or national businesses. To the best of their knowledge, they neither create nor distribute material that is obscene. However, obscenity is determined based on local community standards. *Miller v. California*, 413 U.S. 15 (1973), and the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books*, 372 U.S. at 66.

The draconian effects of RICO, and the potential for massive censorship attempts, are not the idle fears of *amici*'s members. The court below affirmed forfeiture of thirteen retail establishments from a business that during over 20 years of existence sold just four magazines and three videotapes that were later adjudicated to be obscene. *Alexander*, 943 F.2d at 832. The federal marshal's office in Minneapolis trucked three tons of magazines, videotapes and other inventory from Alexander's thirteen retail establishment to a garbage processing plant where the magazines were burned and the videotapes crushed. *Minneapolis Star Tribune*, October 19, 1991 at 1B. This mass destruction, on its face, suggests a pretextual use of RICO to unlawfully censor otherwise protected sexually explicit materials. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708

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[2] *See United States v. Turkette*, 452 U.S. 576, 591 n.13 (1981) (RICO forfeiture is designed to remove the influence of a convicted RICO defendant "from legitimate business by attacking its property interest" and by removing it "from control of legitimate businesses which have been acquired or operated by unlawful racketerring methods." (*quoting* 116 Cong. Record 602 (1970) remarks of Sen. Hruska)).

(1986) (O'Connor, J., concurring) (pretextual use of a statute to close a bookstore raises First Amendment concerns).[3]

This seizure of presumptively protected speech and the instrumentalities of speech to prevent future speech violations is an unconstitutional prior restraint. Speech is presumed constitutionally protected unless and until found otherwise in an adversarial judicial proceeding. *E.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). Except in extraordinary circumstances not applicable here, government may not restrain speech prior to a judicial determination that the particular speech in question is constitutionally unprotected. *Bantam Books, Inc.*, 372 U.S. at 70 ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). This constitutional prohibition against "prior restraints" on speech is an elementary principle of First Amendment law.

In the core case of *Near v. Minnesota*, 283 U.S. 697 (1931), the trial court found several issues of a newspaper to be "malicious, scandalous, and defamatory." Applying a Minnesota law, the trial court enjoined the publishers from disseminating other "malicious, scandalous, or defamatory" issues in the future. *Id.* at 706. This Court held the trial court's injunction unconstitutional as an impermissible prior restraint against future publication, although Minnesota could still impose criminal punishment for the offending issues. "[I]n *Near* the Supreme Court condemned prior restraints prohibiting future expression that may fall within the purview of the First Amend-

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[3] If concerned ever so slightly with the public fisc or the public's right of access to protected materials with sexually explicit content, the government could have sold Alexander's seemingly lucrative businesses, which generated substantial income, and which obviously enjoyed the demand of at least a considerable portion of the reading public. *See Alexander*, 943 F.2d at 829 (finding $8.9 million in proceeds from Alexander's communication businesses for the years 1985 through 1988).

ment where such restraint is based only on a finding of unprotected present conduct." *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551 (11th Cir. 1983) (per curiam) (affirming on the basis of district court's opinion).

Since the decision in *Near*, numerous courts have struck down statutes that permit the closure or "padlocking" of a bookstore or other speech enterprise based on a finding that the enterprise had engaged in obscene or otherwise unprotected speech in the past.[4] These courts have invoked the prior restraint doctrine because padlocking a bookstore is the equivalent of enjoining it from selling presumptively protected books in the future.[5] Likewise, seizing and destroying a

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[4] *E.g., People v. Sequoia Books, Inc.*, 127 Ill. 2d 271, 537 N.E.2d 302 (1989), *cert. denied*, 493 U.S. 1042 (1990); *Minot v. Central Ave. News Inc.*, 308 N.W.2d 851 (N.D.), *appeal dismissed*, 454 U.S. 1117 (1981); *People v. Projection Room Theater*, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 337, 550 P.2d 600, 609, *cert. denied sub nom., VanDeKamp v. Projection Room Theatre*, 429 U.S. 922 (1976); *General Corp. v. State*, 294 Ala. 657, 320 So. 2d 668, 675 (1975), *cert. denied sub nom., Sweeton v. General Corp.*, 425 U.S. 904 (1976); *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760, 769-771 (1976); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153, 157 (1974); *Gulf States Theatres, Inc. v. Richardson*, 287 So. 2d 480, 490-492 (La. 1973). *Cf. Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983) (revocation of business license); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) (same); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980) (same).

[5] *See General Corp.*, 320 So. 2d at-675. ("The padlocking of [a speech enterprise] for one-year constitutes prior restraint at its worst and is patently unconstitutional." (citation omitted)); *Gulf States Theatres, Inc.*, 287 So. 2d at 491-92. ("[U]nder our statute there can be no expression of any kind — good or bad — emanating from the premises or from the devices of the premises for a period of one year. This is the very essence of the prior restraint condemned by Blackstone, by our Bill of Rights, and by our jurisprudence.")

business is the functional equivalent of padlocking it.[6] In either case the business no longer can offer protected materials to the public.[7]

The flaw in the RICO forfeiture provisions at issue here is no different than the prior restraints invalidated in *Near* and its progeny:

> In . . . [these] cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books v. Sullivan* [cite omitted]. The separation of these forms of speech calls for "sensitive tools," [cite omitted].

Vance v. Universal Amusement Co., 445 U.S. 308, 311 n.3 (1980). The sensitivity that this Court has demanded in protecting First Amendment rights is hardly evidenced by the conclusion of the court below that separating obscene and protected materials was simply unnecessary so long as there was some undefined, unquantified "nexus" between Alexander's "rack-

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[6] *See Marcus v. Search Warrant of Property*, 367 U.S. 717, 731-33 (1961) (invalidating as an impermissible prior restraint the large scale confiscation of expressive materials).

[7] *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), is not inconsistent with this position. The act precipitating padlocking under the nuisance law at issue in *Arcara* was not in any way related to speech, and therefore the resulting restriction on First Amendment activities was not subject to First Amendment scrutiny. (478 U.S. at 706.) Further, the case did not, for example, involve padlocking other locations at which prostitution had not occurred.

eteering activity" and the three tons of presumptively protected material burned. *See Alexander*, 943 F.2d at 833.

In *United States v. California Publishers Liquidating Corporation*, 778 F. Supp. 1377 (N.D. Tex. 1991), the district court for the Northern District of Texas, applying discretionary obscenity forfeiture standards under the provisions of 18 U.S.C. § 1467 (forfeiture provision of federal obscenity statute) to facts similar to those in the case *sub judice*, found that forfeiture of an entire speech business would be an unconstitutional prior restraint:

> Forfeiture under these circumstances of truly *de minimis* use of the properties for the commission of the [obscenity] offenses simply serves no legitimate end; that is, no end other than destroying legal business enterprises simply because their stock in trade is sexually related materials.

Id. at 1389.

> . . . [T]he Government's requested forfeiture of Great Western's printing facility is subject to close First Amendment analysis and likely would, if granted, constitute an impermissible prior restraint of expression under *Near v. Minnesota* and its progeny.

Id. at 1394.

Notwithstanding *Near* and its progeny, and the clear equivalency in impact among injunction, padlocking and seizure, in this case the Eighth Circuit appropriated the simplistic and mistaken holding of *United States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990), that because several items of expressive materials were found to be obscene in one community, protected expressive materials can be seized

and destroyed without any implication of First Amendment protections so long as RICO's post-conviction procedures are followed.

> The forfeiture of non-obscene books, magazines and videotapes, after a conviction of racketeering involving the sale of obscene goods and after the jury has determined that the forfeited materials were acquired or maintained in violation of 18 U.S.C. § 1962 and afforded the . . . [defendants] a source of influence over the racketeering enterprise, does not violate the First Amendment. The fact that some of the materials forfeited are not obscene does not protect them from forfeiture when the procedures established by RICO are followed, as they were in the present case.

Alexander, 943 F.2d at 833 (*quoting Pryba*, 900 F.2d at 756).

Neither *Pryba* nor the decision below satisfies the searching analysis this Court requires when the exercise of First Amendment protected activities is threatened. Both *Pryba* and the court below mistakenly concluded that, so long as some undefined, unquantified "nexus" was established between defendant's racketeering activity and the presumptively protected materials forfeited, no further inquiry or protection need be afforded to accommodate First Amendment rights. *Alexander*, 943 F.2d at 833, *quoting Pyrba*, 900 F.2d at 755. The result, however, is precisely the evil *Near* and its progeny forbid: government cannot stifle future presumptively protected speech based on a finding of or "nexus" to present or past undesirable speech. *See Vance*, 445 U.S. 311 n.3. Government cannot suppress one expression simply because of its connection to another that was found unlawful. There can be no censorship by association.

Further, this Court has made it clear that the question of whether a statute operates as a prior restraint must be determined not through formalistic analysis, but through a realistic inquiry into the actual effects of the statute on protected expressive activity. *See Fort Wayne Books, Inc.*, 489 U.S. 46, 109 S. Ct. at 929 (1989) ("this Court has recognized that the way in which a restraint on speech is 'characterized' under State law is of little consequence."). As stated in *Near*, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . .; in accordance with familiar principles, the statute must be tested by its operation and effect." *Near*, 283 U.S. at 708. As this Court held in *Organization For A Better Austin v. Keefe*, a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. 415, 418-19 (1971).

The plain effect of the forfeiture provisions is to restrain, and indeed destroy, further expression because of the unlawful content of prior expression. The court below avoided First Amendment analysis by characterizing the non-obscene seized books, periodicals and videotapes as proceeds from a "criminal enterprise" acquired through "participating in a racketeering activity" indistinguishable from and entitled to no greater protection than proceeds from drugs, gambling equipment or other contraband. No such easy and facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions create the substantive harm that the prior restraint doctrine aims to prevent — the suppression of protected expressive materials which have not been adjudged obscene, and the seizure of the instrumentalities of expression, all as a consequence of prior speech. Labelling such expression as "racketeering" can no more strip away First Amendment protection than did labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)); "Communist" (*DeJonge v. Oregon*, 299 U.S. 353 (1937)); anti-Semitic (*Near v. Minnesota, supra*); or

"subordinators of women" (*American Booksellers Ass'n*, 774 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).

Nor is this case similar to the situation cited in *Pryba*, 900 F.2d at 755, when a defendant "launders" illegal drug moneys by purchasing a newspaper or book publisher and then claims First Amendment protection against forfeiture.[8] Here, instead, the speech business is sought to be destroyed for its speech activities, and expression, unlike proceeds from drugs, is entitled to First Amendment protection.

The Solicitor General has suggested that the First Amendment is in no way implicated because forfeiture is merely another mode of criminal punishment, that the protected materials and business seized and destroyed had less monetary value than the possible fine, and that therefore the prior restraint argument is without merit. These arguments neglect the unambiguous teaching of *Near* that courts must focus on realities, not labels. *See Near*, 283 U.S. at 708. Denominating seizure and destruction of protected speech as a criminal penalty does not alter these realities. In the case of a fine, the protected speech and communicative business can be sold to another and continue its protected First Amendment activities; not so when it has been seized and destroyed, burned and crushed. Calling the padlocking in *Vance* and in the cases cited in footnote 4 a criminal penalty would not have changed the result in those cases. Nor should it here.

Applying the strictures of *Near*, courts must also look to the "operation and effect" of the challenged statute. Criminal penalties such as fines or imprisonment are the traditional price one must pay for past wrongdoing. They are imposed primarily

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[8] Even if a First Amendment enterprise were purchased with "laundered" drug money, we submit that the enterprise or materials may not be destroyed, although perhaps it could be forfeited.

to punish, deter, exact retribution and rehabilitate, not to prevent and restrain future expression. Their impact on future expression is incidental to these legitimate goals. The operation and effect of the forfeiture — and, more precisely, its intent — is to destroy a protected communication business as a penalty for a relatively few speech related criminal acts.[9] Speak no more, that is the unconstitutional operation and effect of the law. Forfeiture is as unconstitutional as padlocking or injunctions. This Court should so hold.

II.

RICO FORFEITURE IN ITS BROADEST SWEEP HAS AN UNCONSTITUTIONAL CHILLING EFFECT

While the RICO statute's forfeiture penalties clearly operate as an unconstitutional prior restraint when applied to speech businesses, equally ominous and pervasive is the chilling effect that the mere threat these draconian penalties have on protected First Amendment activities. Retailers, distributors and publishers will avoid a provocative publication or movie that may be viewed by some as treading too close to the obscenity threshold because a simple miscalculation could lead to the forfeiture of one's business. The threat to First Amendment protections is always especially acute where questions of obscenity statutes are involved because, as this Court has itself acknowledged, there is no bright line guide for what is protected and what is not. *Bantam Books, Inc.*, 372 U.S. at 66. While the question of whether a chemical substance is an illegal drug may be determined objectively in a laboratory, the determination as to whether books, periodicals or movies are obscene will vary

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[9] See the reference to RICO's legislative history at footnote 1, *supra*.

from publication to publication, community to community, and from jury to jury, as each applies the standard of *Miller v. California*, 413 U.S. 15 (1973). Permitting nationwide seizure in effect impermissibly abandons the diversity of community standards mandated by *Miller*, for the unconstitutional and dangerous standard of the lowest common denominator.

Many familiar examples serve as reminders that books now recognized as literary classics were once banned as obscene under the standards of their day. If RICO had been widespread a few decades ago, booksellers might have had their stores seized merely for stocking the latest copies of works by Theodore Dreiser, D.H. Lawrence, or Edmund Wilson. As Justice Scalia noted in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 252-53 (1990) (concurring and dissenting), "RICO penalties for obscenity . . . intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as *Ulysses*." *See also Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's *An American Tragedy* held obscene); *People v. Doubleday & Co.*, 272 App. Div. 799, 71 N.Y.S.2d 736 (1st Dept.), *aff'd*, 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd*, 335 U.S. 848 (1948) (Wilson's *Memoirs of Hecate County* held obscene); *People v. Dial Press, Inc.*, 182 Misc. 416, 48 N.Y.S.2d 480 (N.Y. Magis. Ct. 1944) (holding D.H. Lawrence's *Lady Chatterly's Lover* obscene). *See also United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (unsuccessful obscenity challenge to Joyce's *Ulysses*).

Such cases as *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986), and *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987), show the real danger that a vocal minority in a community will use the RICO statutes to threaten the entire business of any bookseller or retailer who deals in material which, though constitutionally protected, is deemed objectionable. The burden will be particularly great on a regional or national book, periodical or video business which, by distributing material that might be considered obscene in only one or two communities in the state, could potentially have its entire business seized.

The result can only be that booksellers, publishers and distributors will avoid disputed works in order to avoid the threat of forfeiture of their entire businesses. By its draconian penalties, RICO will thus impermissibly chill the dissemination of controversial protected materials, and is therefore unconstitutional.

III.

RICO'S FORFEITURE PROVISIONS ARE NOT SUFFICIENTLY NARROWLY TAILORED WHEN APPLIED TO A SPEECH BUSINESS TO SURVIVE FIRST AMENDMENT SCRUTINY

Two courts of appeals have ordered the seizure and destruction under RICO of entire speech business's inventories based on findings that a minimal number of expressive materials were obscene. Such an application of RICO forfeiture violates this Court's long-held admonition that criminal laws must be tailored narrowly and carefully to the extent they curtail First Amendment activities. *See Smith v. California*, 361 U.S. 147, 150-51 (1959) ("Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it."). *See also Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 112 S. Ct. 501, 509 (1991) ("[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.").

In *Adult Video Ass'n v. Barr*, 1992 U.S. App. LEXIS 13786, No. 90-55252, slip op. at 6838 (9th Cir. June 18, 1992), the Ninth Circuit held that RICO's forfeiture provisions do not pass constitutional muster, and that they must be considerably narrowed in order to avoid dangerous abridgement of First Amendment rights:

> [T]he current breadth of RICO's forfeiture provision cannot pass constitutional muster. At the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. . . . Tailoring the scope of forfeiture acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures. . . . The forfeiture of assets derived from drugs, arson, fraud, and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes. Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."

Amici submit that the Ninth Circuit's analysis in *Adult Video Ass'n* comports with this Court's prior decisions. RICO forfeiture, as written and as applied by the court below, is unconstitutionally overbroad and a prior restraint when applied to a speech business. *Amici* accept, however, that limited forfeiture may comply with the First Amendment. Material

found obscene under the standards of a community may be seized and destroyed if located in such community. In addition, any proceeds directly traceable to the sale of the obscene materials in the same community may similarly be seized. However, presumptively protected expressive material may not be seized and destroyed. Both the geographical limitation on material seized and the requirement that no protected expressive materials be destroyed are important and are constitutionally mandated.

The geographical limitation is required under the community standards test formulated in *Miller*. Expressive material is not found to be obscene generally and without limitation; it is found to be obscene with respect to a particular community. *Cf. United States v. Various Articles of Obscene Material*, 433 F. Supp. 1132 (S.D.N.Y. 1976) (material obscene in New York City may not be obscene in Lancaster, Pa.), *rev'd on other grounds*, 562 F.2d 185 (2d Cir. 1977), *cert. denied sub nom., Long v. United States*, 436 U.S. 931 (1978). Were forfeiture to extend beyond the community, the seizure would involve presumptively protected materials, a result unacceptable under the First Amendment. This is particularly relevant in the federal system where the prosecutor may choose a community with a particularly stringent community standard in which to indict. *See e.g. U.S. v. Calif. Publishers Liquidating Corp.*, 433 F. Supp. at 1138.

Further, the requirement that no protected materials be destroyed is important to guard against the danger warned of by Justice O'Connor in her concurrence in *Arcara* — that the government might use a "statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood." *Arcara*, 478 U.S. at 708. *See also U.S. v. P.H.E., Inc.*, 965 F.2d at 858. To the extent that RICO gives the government the power to destroy protected materials, then the government can target these enterprises selling or creating

protected speech of which the government disapproves, even though the speech is entitled to the full panoply of First Amendment protections. Under these circumstances of pretext, according to Justice O'Connor's reasoning, "the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara*, 478 U.S. at 708.

In *Fort Wayne Books*, this Court held that an entirely different analysis must take place when presumptively protected materials are seized, as opposed to ordinary unprotected contraband. *See* 489 U.S. at 46, 109 S. Ct. at 929. Yet the Court below made no distinction between the presumptively protected materials that were not only seized, but were destroyed. Certainly an application of a statute which makes no distinction between such a book burning and the destruction of ordinary contraband, such as a cache of illegal narcotics, pays little heed to rigor which this Court applied to such a distinction with respect to pre-trial seizures in *Fort Wayne Books*.

Even when the protected materials are directly traceable proceeds from the sale of unprotected materials, applying First Amendment scrutiny, they can be forfeited but must not be destroyed. Rather, through sale at auction, these protected materials should be returned to the marketplace of ideas.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the Eighth Circuit requiring forfeiture of an entire speech business be reversed.

September 2, 1992

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